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Supreme Court, U.S.
FILED

AUG 20 2002

OFFICE OF THE CLERK

No. 01-1778

IN THE

Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

Petitioner,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The briefs in opposition of the judicial respondents and the United States fail to obscure the two most critical features that make this case appropriate for resolution by this Court: (1) The court of appeals' ruling stands apart from federal judicial precedents in holding that a statute can and does foreclose any court from considering a substantial constitutional claim — a holding that, as this Court has repeatedly stated, is itself of highly doubtful constitutionality. (2) The effect of the court's ruling is to approve the punishment of a federal judge by judicial administrative bodies, based upon their disagreement with his substantive and procedural judicial rulings and actions, without any consideration by a court of his substantial constitutional claim that that punishment infringes core values of Article III judicial independence.

The judicial respondents' brief in opposition, while asserting the absence of a conflict among the circuits on these precise points, does not contest that their resolution is a matter of importance to the judicial system. And the United States' brief in opposition does not oppose a grant of certiorari on these issues, but confines itself solely to opposing a grant of certiorari on the facial constitutionality of the Judicial Conduct and Disability Act.

Both the court of appeals' novel and unprecedented review-preclusion ruling and the as-applied constitutional claim of infringement on judicial independence that that ruling foreclosed should be addressed by this Court. Simultaneously, to settle important questions fundamental to the administration of the Judicial Conduct and Disability Act, the Court should take up the facial constitutionality of the Act's disciplinary provisions and whether its terms authorize discipline for conduct that is not the subject of any complaint and is related to the merits of judicial rulings.

I. The Review Preclusion Issue Merits Review.

The judicial respondents assert that there is no direct conflict among the Circuits over whether 28 U.S.C. § 372(c)(10)

bars as-applied constitutional challenges to judicial discipline under the Judicial Conduct and Disability Act. That is true, but trivially so. More to the point is that a host of opinions of this Court, other circuits, and the D.C. Circuit itself hold that statutes whose language is indistinguishable do *not* bar review of constitutional claims; that the federal courts, following *Johnson v Robison*, 415 U.S. 361 (1974), and *Webster v. Doe*, 486 U.S. 592 (1988), have repeatedly stated that only a compelling, affirmative expression of legislative intent to bar review of constitutional claims could support such a construction of a review preclusion statute; and that the legislative history, as the court of appeals acknowledged (App. 10a), contains no such express indication that constitutional claims were to be precluded (let alone that *as-applied* claims were to be precluded and facial claims permitted).[1] The respondents have no answer to these points.

Even more importantly, the judicial respondents fail to acknowledge that the *reason* precedents of this Court and the circuits — with the exception of the decision below[2] — have

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[1] Although the judicial respondents assert that the D.C. Circuit majority's legislative history analysis supports its conclusion that there was a clear expression of legislative intent to foreclose constitutional claims, the majority conceded that it was able to cite no statement anywhere in the legislative history that review of constitutional claims was to be foreclosed. Instead, the legislative history reviewed by the majority established no more than that Congress intended to include a finality provision in the statute (which is of course true whenever a statute contains such a provision) and that at one point in the legislative history, a backer of one version of the legislation noted that this Court's decisions indicate that judicial review of constitutional claims may be required — a point that would tend to suggest an *absence* of intention to foreclose such claims.

[2] The judicial respondents cite the Third Circuit's unpublished decision in *Cunningham v. Becker*, No. 01-1489 (3d Cir. Aug. 23, 2001), but since the Third Circuit itself regards the opinion as nonprecedential, it hardly advances their position. The judicial respondents further assert that *Cunningham* illustrates the danger that if the statute is not read to preclude as-applied constitutional claims, disgruntled complainants will file constitutional challenges to the dismissal of complaints under the Act.

(footnote continued)

read statutes not to preclude review of constitutional claims is that such a construction itself poses grave constitutional questions. *See Webster*, 486 at 603. In light of the Judicial Conference Review Committee's determination that it lacked authority to entertain Judge McBryde's as-applied constitutional challenges (App. 150a-51a), the effect of the D.C. Circuit majority's decision is to "den[y] *any* forum — federal, state or agency — for the resolution of a federal constitutional claim," *Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987), a result this Court has so far refused to countenance and that lower federal courts (including the D.C. Circuit itself) have stated would be unconstitutional. *See id.*; *see also Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988) ("A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action ....").

That the constitutional claims precluded are as-applied as opposed to facial ones is of no moment. This Court's own decisions in the area have involved as-applied claims (*e.g., Webster*), and, as the Seventh Circuit has observed, "[i]t is hard to see how the Court would insist on the right to review the constitutionality of legislation, but hold immune from review all unconstitutional administrative actions taken pursuant to that legislation." *Maroszan*, 852 F.2d at 1476.

Nor is it an answer to this point, as the judicial respondents suggest, that although the D.C. Circuit's ruling denies judicial review of as-applied constitutional claims, those

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But because a complainant would generally have no legally protected interest in whether a judge were sanctioned, such claims would in most cases be dismissed as frivolous even if not barred by § 372(c)(10) (as the courts in *Becker* dismissed the plaintiffs' facial constitutional challenge). To the extent there might be circumstances in which a complainant *did* have a valid constitutional claim (for example, if a chief circuit judge dismissed complaints in a racially discriminatory manner), precluding review of such a claim would no more acceptable under the Constitution and statute than preclusion of Judge McBryde's claims.

claims are still subject to consideration by the Article III judges who make up the judicial councils and the Judicial Conference. Given that those bodies have expressly disclaimed authority (and institutional competence) to conduct constitutional adjudication (App. 150a-51a), the administrative review process under the Act plainly cannot function as an adequate substitute for a court's consideration of constitutional claims, regardless of the fact that the members of those bodies are also Article III judges. Indeed, although they now assert that the D.C. Circuit's preclusion decision was correct, the judicial respondents conceded below that the statutory finality provision did not bar Judge McBryde's constitutional claims, precisely because the Conference Review Committee had expressly stated in its own memorandum and order that "[t]he courts of the United States are open for the adjudication of such questions." App. 151a.

Moreover, even if the councils and the Conference were to assume the function of hearing constitutional claims, there is all the difference in the world between consideration by an administrative body (be it composed of judges, bureaucrats, or anyone else) of whether *its own actions* violate the Constitution, and independent review of those actions by Article III judges convened as a *court of law*. The Fifth Circuit's decision in *In re McBryde*, 117 F.3d 208 (5th Cir. 1997), illustrates the point. There, the Chief Judge of the Northern District of Texas and the Fifth Circuit Judicial Council — Article III judges all — took actions in their administrative capacities to interfere in Judge McBryde's adjudication of cases properly before him. When those actions were subjected to the rigors of a challenge in a court of record required to conform its decision to the law, the Article III judges who composed the court found their colleagues' administrative actions unlawful. As *In re McBryde* strikingly demonstrates, giving administrative decisionmaking power to officials who happen to be judges is no substitute for *judicial review*.

The question starkly posed here is whether this Court should let stand, for the first time, a decision holding that a

generally stated finality clause in a statute bars judicial review of constitutional claims. That the constitutional claims the lower court held to be foreclosed go to the heart of judicial independence under Article III of the Constitution is all the more reason not to let the D.C. Circuit's preclusion ruling go unreviewed. Whether federal judges, alone among litigants in the United States courts, are to be barred from raising constitutional challenges to administrative punishments imposed on them is an issue this Court should decide.

II. This Court Should Decide the Constitutionality of Punishing a Judge for his Judicial Decisionmaking.

The judicial respondents profess not to understand the as-applied constitutional claim at the heart of the second question presented in this matter. *See* Jud. Resp. Br. in Opp. 20-21. The claim, however, is by no means "difficult to parse." *Id.* In a nutshell, it is that the judicial independence guaranteed by Article III is infringed if a judge is punished (or "sanctioned" or "disciplined") based on the merits of procedural and substantive decisions, rulings and judicial actions in cases properly before him as a judge.[3] Contrary to the suggestion of the judicial respondents, this claim is squarely presented in this case and does not require the Court either to ignore factual findings made below (*id.* at 22) or to "assume" that "anything that a federal judge does as a judge is a 'ruling' or 'action' that is 'based on the merits'" (*id.* at 20). The claim requires only that the Court examine what the Council

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[3] In addition to purporting not to understand this claim, the judicial respondents inexplicably suggest that Judge McBryde is requesting that this Court entertain the claim even if it does not address the D.C. Circuit's antecedent preclusion ruling. *See* Jud. Resp. Br. in Opp. 19. Obviously, the Court can review the as-applied constitutional challenge only if it is reviewable, and nothing in the Petition for Certiorari suggests otherwise. *See* Pet. for Cert. 15 ("As Judge Tatel recognized, rejection of the panel majority's flawed preclusion analysis brings this [as-applied constitutional] issue squarely to the forefront.").

and Conference actually did, rather than their own self-serving characterizations of their actions.

For example, the basis for the punishment of Judge McBryde by the Judicial Council included, crucially, that he "imposed unwarranted sanctions upon lawyers" (App. 160a). The imposition of a sanction by a judge is unmistakably a ruling made in a case before him, and the assertion that the sanction is "unwarranted" can only be understood as an assessment of the merits of that ruling. It is simply nonsense to say, on the one hand, that Judge McBryde was disciplined for imposing unwarranted sanctions and, on the other, that the Council and the Conference Review Committee found as a "fact" that he was not disciplined based on the merits of his procedural or substantive rulings.

Similarly, as detailed in the Petition,[4] and as substantiated by the report of the committee of the Judicial Council (App. 163a-301a), the "attacks" by Judge McBryde on lawyers and others largely involved findings and credibility determinations he made and orders he issued in cases properly before him, and his "arbitrary," "abusive" and "intimidating" conduct consisted largely in his enforcement of procedural trial

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[4] The judicial respondents assert that the Petition mischaracterizes the basis for the Council's actions, but it identifies only two supposed mischaracterizations: the statements that the Council's actions were based in part on Judge McBryde's prohibition of newspapers in the courtroom and on his dress code for participants in jury trials. These are not mischaracterizations. As to newspapers, the committee report prominently cited the testimony of a lawyer that the atmosphere in Judge McBryde's courtroom was like "walking on eggshells." App. 261a. In the original transcript, the witness explained what he meant by "walking on eggshells" by recounting that a court security officer had advised him to put his newspaper away before Judge McBryde took the bench. J.A. 514. Similarly, a federal public defender whose testimony was cited in the committee report for the "oppressive" atmosphere in Judge McBryde's courtroom (App. 261a) complained in particular about the dress code. J.A. 405-08. Moreover, because the brief in opposition does not specifically identify any other supposed inaccuracies beyond these two, any claim that there are others is waived. *See* S. Ct. R. 15.2.

rulings (*see* App. 251a-263a). The judicial respondents' insistence that, as a matter of "fact," the actions taken against Judge McBryde were not based on disagreement with the merits of his judicial rulings cannot obscure what is apparent from the face of their own orders. In short, it is the judicial respondents, not Judge McBryde, who seek to avoid the issue by relying on "characterizations" of the actions below.

Moreover, the judicial respondents' assertion that Judge McBryde's position rests on the assumption that anything a judge does is a "ruling" is a red herring. This is not a case where a judge has committed an assault or employed racial epithets in the course of conducting judicial business — or even raised his voice — and Judge McBryde's position that disciplining him for the actions at issue is unconstitutional in no way turns on answers to hypothetical questions about what should be the result in such cases. *Cf.* Jud. Resp. Br. in Opp. 20. Here, although the Conference Review Committee asserted that Judge McBryde was properly disciplined based on a "pattern of conduct that is evidenced by [his] orders and rulings" (App. 143a), the only "conduct" those orders and rulings "evidenced" was their own issuance, and the only reason that "conduct" was deemed a basis for discipline was that it was "harsh" and "unwarranted" — that is, that the orders and rulings were *wrong on the merits*.

Other than their unpersuasive argument that, as a matter of "fact," Judge McBryde was not actually punished for the merits of his substantive and procedural rulings, the judicial respondents offer virtually no reason why Judge McBryde's as-applied challenge does not merit this Court's review. They do not contend that sanctioning a judge based on the substance of his judicial actions does not affect his judicial independence, nor do they assert that the legitimacy of such sanctions is not an issue of importance to the federal judiciary. And their continued insistence that the sanctions against Judge McBryde were, in the end, appropriate, is simply an argument on the merits, not a reason why this Court should not review the issue.

III. The Issue of the Act's Facial Constitutionality Also Deserves This Court's Attention.

The United States insists that the expiration of the case suspension and disqualification sanctions renders Judge McBryde's facial challenge to the Act partially moot and thus prevents this Court from reaching the constitutionally most troubling feature of the Act: its provision that judicial administrative bodies shall share in the power, granted by the Constititution exclusively to the President and the Senate (in the appointment provisions) and to the House and Senate (in the impeachment provisions), to determine what persons are fit to exercise the judicial power of the United States. The United States' mootness analysis, however, does not address the "here-and-now subservience" that the Act continues to impose on Judge McBryde. *See WMATA v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991). Moreover, because the Act permits only "temporary" suspensions (28 U.S.C. § 372(c)(6)(B)(iv)), the consequence of the government's mootness argument would be to effectively immunize the Act's constitutionality from judicial scrutiny. The mootness doctrine is not so inflexible. *See Honig v. Doe*, 484 U.S. 305, 323 (1988).[5]

On the merits, the respondents do not contest that the constitutionality of granting committees of judges disciplinary power over other judges has generated much scholarly and judicial debate, nor do they argue that a definitive resolu-

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[5] The judicial respondents (but not the United States) quibble with the Petition for not designating mootness a separate question presented. The D.C. Circuit majority's discussion of mootness was inseparable from its consideration of the scope of the facial constitutional challenge, and it is fairly comprised within the third question presented. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 388-90 (1994). Moreover, the Petition makes abundantly clear that it challenges the mootness holding as part of its challenge to the resolution of the constitutional claims. *Compare Peters v. Kiff*, 407 U.S. 493, 495 (1972) (entertaining an issue under such circumstances), *with Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (declining to entertain a question where *nothing* in the petition raised it).

tion of the debate is not desirable. Instead, they suggest that the debate was already resolved by this Court in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), and by the Eleventh Circuit in *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1508-10 (11th Cir. 1986). In fact, both courts expressly *declined* to reach the merits of the constitutionality of giving judges case suspension authority over fellow judges, and both decisions recognize that the issue is a difficult one. *See id.* at 1510.

Respondents also urge that the constitutional impeachment remedy is nonexclusive, and offer as proof that executive officers subject to impeachment may also be removed by the President. The argument overlooks, however, the fundamental difference between a unitary and hierarchical executive branch subject to the President's direct supervision, *see Clinton v. Jones*, 520 U.S. 681, 710-711 (1997) (Breyer, J., concurring in judgment), and a judicial branch in which the structure of *courts* is hierarchical but the tenure of each individual *judge* is expressly protected by Article III, section 1.

IV. The Absence of Statutory Authority for the Actions Against Judge McBryde Also Merits Review.

The judicial respondents' argument that the Court should not entertain Judge McBryde's statutory claims rests largely on the assertion that they present merely factual issues. Jud. Resp. Br. in Opp. 28. In fact, the issues they pose are exclusively legal: whether the statute precludes claims that a judicial council acted in the absence of statutory authority, whether a judge may be sanctioned for actions not the subject of any complaint, and whether the statute bars discipline based on the merits of procedural and substantive rulings.

The judicial respondents further assert that, although the conduct for which Judge McBryde was sanctioned was for the most part not the subject of any complaint, Fifth Circuit Complaint Rule 9(A) authorized expansion of the investigation beyond the scope of the complaints. But a rule cannot confer authority beyond that authorized by statute, *see Bowen*

v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988), and the statute clearly contemplates discipline based on a complaint. Moreover, even if an *investigation* beyond the bounds of a complaint may be permissible, if that investigation does not lead to the "identification" of additional complaints, it cannot expand the scope of the discipline ultimately authorized under the Act. *See* 28 U.S.C. § 372(c)(1).

As for the statutory prohibition on complaints "directly related to the merits of a decision or procedural ruling," the judicial respondents contend that because the statute states only that such complaints "may" be dismissed (§ 372(c)(3)), it must be read to mean that dismissal of merits-related complaints is discretionary, not mandatory. The judicial respondents' position overlooks that in statutes, "may" sometimes means "shall" where the context demands. *United States v. Rodgers*, 461 U.S. 677, 706 (1983); *see, e.g., Tashima v. Administrative Office of U.S. Courts*, 967 F.2d 1264 (9th Cir. 1992). This is such a case. If a merits-related complaint were cognizable under the statute, it would make no sense to permit a chief judge to dismiss it for that reason. Thus, as the Fifth Circuit noted in *In re McBryde*, the statute must "requir[e] the dismissal" of such complaints. App. 355a. Contrary to the position it now takes in the judicial respondents' brief in opposition, the Conference Review Committee's own decision purported to acknowledge that "a judge indeed may not be sanctioned out of disagreement with the merits of rulings" (App. 143a) — though it then proceeded to do just that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2002